

SECTION 10. LAND USE, URBAN GROWTH AND PLANNING LAW

INTRODUCTION

Along with budget management and the provision of police and sanitary services, land use control is often seen as among a city's most elementary functions. Elected officials are charged with the responsibility of determining what the landscape looks like, where specific activities can locate, and how potentially conflicting activities can coexist within a limited geographic area. Land use review also represents a very complex area of the law.

A. PREEMPTION

Before discussing the adoption and implementation of plans and zoning ordinances, it is helpful to note that most planning and zoning issues are a "municipal affair" and subject only to City resolution; certain other matters, however, have been either reserved or declared preempted under state and federal statutes.

A locally important urban planning-related preempted area is in annexations. The rate at which the City expands geographically is determined pursuant to processes under state law. All annexations of land to the City are reviewed and approved by the Local Area Formation Commission ("LAFCO"). Each county has its own LAFCO. In Fresno County, both the board composition and annexation proposal processes are statutorily established. LAFCO is important to planning in Fresno because LAFCO must approve the City's *sphere of influence*, or eventual, probable growth boundaries.

B. PLAN ADOPTION AND IMPLEMENTATION

At the heart of land use planning is the adoption and implementation of **general, community and specific plans**.¹⁰³ Adherence to plans is important, not only to achieve planning goals, but also to comply with legal requirements that certain land use, public works, and funding decisions be made consistent with adopted plans. State law directly governs some planning-related decisions. Fresno has also adopted its own ordinance governing procedures for the adoption of administration of the **General Plan** and other plan documents, known as the Local Planning and Procedures Ordinance ("LPPO").¹⁰⁴

1. Plan Hierarchy.

There are three basic "levels" of plans in Fresno:

¹⁰³ California Government Code §§ 65300, *et seq.* & 65803.

¹⁰⁴ Found at Article 6 of the Zoning Ordinance (Fresno Municipal Code ("FMC") Chapter 12).

(a) **General Plan.**

The City is required to have a **general plan** under the state Planning and Zoning Law.¹⁰⁵

(1) **Blueprint for Physical Development.**

The **general plan** is an overall statement, or blueprint, of the physical development of a community. State law requires that each city's general plan be "comprehensive, long-term" and for the physical development "of the community."¹⁰⁶ The general plan must cover all incorporated territory and should go beyond the city limits to include any land outside city boundaries "which . . . bears relation to its planning."

(2) **Maps and Text.**

The general plan sets forth its policies in two formats, both graphically and textually. Both formats provide operable policies; a provision is still binding regardless of its format. The most commonly referenced map is the Land Use Diagrams. The Land Use Diagram is a map (generated using the City's Geographic Information Systems software program) of the entire City, setting forth **land use designations** for each parcel. The designations specify intended classes and intensities of use. Additionally, the **plan text** sets forth what are generally called the "**plan policies**"; this is a term often applied generically to apply interchangeably to what are actually three separate, major types of plan text provisions; plan **goals** or **objectives**; next are **policies** which implement those goals and objectives; finally, there are **implementation measures** and **criteria**, which are usually, but not always, more specific than policies.

(b) **Community Plans.**

Community plans are considered the "intermediate level" of plans. Community plans cover particular areas of the City and, generally speaking, include more detailed and neighborhood policies than does the General Plan. Examples are the Edison Community Plan and the Woodward Park Community Plan. As with the General Plan, community plans set forth their planning policies both graphically and textually.

¹⁰⁵ California Government Code §§ 65300, *et seq.*

(c) Specific Plans.

Specific Plans, such as the Tower District Specific Plan and Fulton/Lowell Specific Plan, are the most localized and detailed of all of the plans. They often include specific design criteria. As with the General Plan and community plans, policies in specific plans are set forth both graphically and textually.

2. Plan Consistency.

Most actions the City takes in the area of site development, public works, and redevelopment cannot be legally completed unless some kind of finding is made of consistency with the General Plan or the applicable community or specific plan. The California Supreme Court has characterized the general plan as a city's "constitution for all future development."¹⁰⁷ In Fresno, as in most large cities, the same can be said of community and specific plans: the City's Local Planning and Procedures Ordinance ("LPPO") expressly requires rezones, maps, variances, and conditional use permits to be consistent with relevant plan policies. Additionally, state law requires that capital improvement, including such activities as road widening, bike lanes, and street vacations, be consistent with the general plan.¹⁰⁸ Also, the Subdivision Map Act expressly requires all tentative and parcel maps to be consistent with the General Plan.

3. "Amendments" versus "Updates."

Plan amendments are specific modifications, usually proposed in connection with a specific project, to the land use diagrams or text of the General Plan or one of the community or specific plans. A **plan update**, however, is usually more broad-reaching in scope and not tied to a particular project. The City is at this time undertaking a **comprehensive update** to its General Plan.

4. Plan Amendment Procedures.

Plan amendments may be initiated by any one of four mechanisms: Council or Planning Commission resolution; the Development Director's written action; or, by application of the property owner or representative.¹⁰⁹ By practice and Council policy, the Development Department assures that each proposal is submitted to the local citizen's plan committee, which will discuss the proposal with staff and the applicant and make an advisory recommendation to the Planning Commission and Council. The Planning Commission must then hold a hearing on the amendment and make a recommendation on the same to the

¹⁰⁷ *Citizens of Goleta Valley v. County of Santa Barbara*, 52 Cal. 3d 553 (1990).

¹⁰⁸ *Friends of B Street v. City of Hayward*, 106 Cal. App. 3d 988 (1980).

¹⁰⁹ FMC § 12-606.A.

Council. The Council's decision on the plan amendment is final.¹¹⁰ The FMC prohibits an applicant whose plan amendment has been denied from reapplying for "substantially the same" amendment within one year from the date of the denial.¹¹¹

C. ZONING AND REZONES

1. Definition/ Description.

Zoning is a tool to implement adopted plans. Under the most basic definition of zoning:

zoning is simply the division of a city into ***districts*** and the prescription and application of different ***regulations*** in each district. These ***zoning regulations*** are generally divided into two classes: (1) those which regulate the height or bulk of buildings within certain designated districts --- in other words, those regulations which have to do with structural and architectural design of the buildings and (2) those which prescribe the use to which buildings within certain designated districts may be put.¹¹²

2. Zoning Ordinance, Official Zone Map and Regulations.

The City's Zoning Ordinance is set forth in Chapter 12 of the FMC. The Zoning Ordinance, like the General Plan and each of the community and specific plans, consists of both a map and text. The City's Official Zoning Map, maintained by the Development Department, is incorporated into the FMC. The text sets forth the ***zoning regulations***. Each parcel in the City limits is assigned a zoning district. The term "***rezone***," as applied to any given parcel, technically refers to any change in the district which is reflected for the given parcel on the Zoning Map. The Zoning Ordinance, with the associated map, sets forth regulations which are legally enforceable against land uses.

3. Development Standards.

The FMC applies the term "***development standards***" to describe those zoning regulations which set forth basic architectural design of buildings and site layout. Development standards include, but are not limited to, setback, building height, landscaping and minimum parking space requirements. The FMC also provides for a large number of districts organized into general use categories

¹¹⁰ FMC § 12-609.B.3.

¹¹¹ FMC § 12-606.E.

¹¹² Longtin, CALIFORNIA LAND USE, § 3.02[1], summarizing *Miller v. Board of Public Works*, 195 Cal. 477, 486 (1925) (emphasis added).

(such as residential or industrial), which are then broken into separate districts (such as R-1, R-2, R-3).

4. Listed Uses.

Each district is broken into separate lists which enumerate permitted, conditionally permitted, or prohibited uses or activities.

(a) Permitted Uses.

The core character of each district is defined by its list of **permitted uses**. Provided the physical facilities for a proposed development conform to regulations such as height, setback and parking, it is in most cases irrelevant that the City or a neighbor feels that the particular use proposed is not consistent with its surroundings. For this reason, permitted uses are often referred to in Fresno as uses "**by-right**."¹¹³ Property transactions and investments are often based on permitted uses.

(b) Conditional Uses.

The second type of listed uses in each district are conditionally permitted uses. These uses and activities are permitted only where the City has issued a **conditional use permit**. They are uses which the Council has found may, but only on a case-by-case basis, be found to be consistent with a particular zoning district and neighborhood.

(c) Prohibited Uses.

Some uses and activities, called "**prohibited uses**," are expressly prohibited in each district.

5. Director-Classified Uses.

It is difficult - if not impossible - to classify and list each use that could potentially be made of property in the City of Fresno. In addition to the listed permitted, conditional, and prohibited uses - all of which Council establishes by ordinance - the FMC delegates authority to the Development Director to classify unlisted uses through a process known as the **Director's Classification**. Applicants who wish to undertake an activity that staff cannot identify as being included among the Council-approved listed uses in the applicable zoning district may apply for a classification without undergoing a rezone process. Thereafter, future proposed activities which fit the

¹¹³ To some degree the term "by right" is a misnomer because nothing can be automatic if discretion still needs to be exercised in order to find compliance with zoning regulations. In a few, rare, instances, site plans can be denied for permitted uses where there is substantial evidence of actual, imminent harm to neighbors as a consequence of the site plan approval.

Development Director's classification may occupy a site as authorized by the Development Director.

6. Police Power.

The Council's authority to zone is based on the City's police power. This authority is very broad and empowers the City to determine what the City will look like, what types of amenities there are, and how activities are arranged in the urban landscape. Numerous cases could be cited to illustrate the breadth of the Council's authority in zoning. To give just one important example, a land use restriction with no purpose other than to improve the appearance of the streetscape, for instance, has been repeatedly upheld as a substantial government goal; it is only in the manner in which such restriction is applied that is subject to the court's review.¹¹⁴

7. Forms of Zoning in Fresno.

The forms of zoning provided for under the FMC are:

(a) Conventional Zoning.

Most properties are covered under so-called **conventional zoning** districts. This simply means that the only regulations which apply to the particular site are those set forth in the Zoning Ordinance.

(b) Conditional Zoning.

The FMC and state law also authorizes conditions to be placed on rezones. This is called **conditional zoning**. Under this zoning, Council imposes conditions on a zoning approval which often relate to such matters as restricting the types of activities that would otherwise be allowed under the district regulations, or modifying the development conditions. For example, Council may delete alcohol sales from the list of conditionally permitted uses otherwise allowable on the property under the district regulations. Or, Council may require a larger setback to adjust the street appearance of the property. These conditions are just as valid and effective against the property as are any other district regulations. They are made official by execution of a zoning contract which the property owner signs and is recorded. The zone district sign for properties under conditional zoning include the suffix of **"/cz."**

(c) Overlay Districts.

Although not a different type of zoning, note that the FMC provides for several **overlay zoning districts**. These include the "BA" (Boulevard setback) and "BP" (Bluff Preservation) overlay districts. Each overlay

¹¹⁴ *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981)

district has its own regulations. Properties subject to these overlays are subject also to underlying district regulations.

(d) Planned Community and Planned Unit Development.

Other zoning mechanisms provided for under the FMC are the Planned Community ("PC") and Planned Unit Development ("PD") zoning mechanisms. Each has its own, detailed regulations in separate Code sections.

(1) Planned Community ("PC").

The purpose of the PC district is to give the City and developer substantial flexibility in choosing among development tools and standards in planning for a project. It is intended for larger projects. The Dominion Community in Woodward Park was approved under a PC.

(2) Planned Development ("PD").

PD approval retains the property's conventional zoning district and does not involve a zoning change; however, it is analogous to a PC in that it provides for some flexibility not offered by conventional zoning and development standards. A PD project is typically on a much smaller scale than a PC and development is pursued under a Conditional Use Permit.

8. Plan consistency.

Zoning actions must be consistent with the General Plan or any applicable community or specific plan. Any zoning action - - whether it be a rezone or a text amendment - - must be consistent with an operable plan, including maps, diagrams, and textual goals and policies.

9. Zoning Procedures.

Like plan amendments, rezones affecting particular parcels may be initiated by Council or Planning Commission resolution, by the Development Director's written action, or by application of the property owner or representative.¹¹⁵ As with plan amendments, the Development Department submits rezone proposals to the local citizen's plan committee, which will discuss the proposal with staff and the applicant and make a recommendation to the Planning Commission and Council. The Planning Commission must then hold a hearing and makes a recommendation to the Council, which the Council is required to consider as a part of its deliberations. The Council's decision on a rezone application is

¹¹⁵ FMC §§ 12-401.A, 12-403.A.

final.¹¹⁶ The FMC prohibits reinitialization of a denied rezone matter "within one year from the date of the final action denying or disapproving the matter."¹¹⁷ The exception is where the "action [denying the proposal] was specifically stated to be without prejudice."¹¹⁸

D. SPECIAL PERMITS

"Special Permit" is the term the FMC uses to refer to any of three basic types of actions which provide a mechanism for reviewing the details of a proposed development: the conditional use permit; site plan; and variance.

1. Substantial Evidence Requirement.

Perhaps the most important, overriding consideration for any decisionmaker in reviewing a special permit proposal is that the action taken requires the decisionmaker to make certain required **findings** which are based on **substantial evidence**. All special permit actions -- whether permit approvals or denials -- must be supported by **findings based on substantial evidence** to be legally defensible.

(a) Quasi-judicial actions.

All three of the special permit types provided for under the FMC are **quasi-judicial actions**: stated simply, the review and hearing processes of special permits are closer to judicial proceedings than are plan amendments and rezones, which are legislative actions.

(b) Findings.

The FMC sets forth separate, distinct findings for each special permit. Findings must be express and on-the-record. Councilmembers, Planning Commissioners, and staff must be intimately familiar with the required findings. The findings for each of the special permits are set forth at FMC Section 12-405. Failure to make the findings to support a special permit may be legally fatal to the permit.¹¹⁹

(c) Substantial Evidence.

¹¹⁶ FMC § 12-403.F.

¹¹⁷ FMC § 12-401.I.1.

¹¹⁸ FMC § 12-401.I.1.

¹¹⁹ *Topanga Association for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506 (1974).

In making each required finding, the decisionmaker must be confident that the analysis both tracks the FMC's language of and is based on **substantial evidence**. Generally defined, substantial evidence is evidence which is factually based, is concrete, objective, credible, and reliable.

2. Site Plan.

The Site Plan is the most commonly issued of the special permits. The findings for the permit are limited primarily, though not exclusively, to the project's physical design, architectural appearance, landscaping, signage, and consistency with development standards.

3. Conditional Use Permits.

Conditional Use Permits ("CUPs") are required for land uses which the Council has determined need to be carefully reviewed for consistency with surrounding uses on a case-by-case basis. Conditionally permitted uses are not necessarily noxious or inherently inconsistent with the underlying zoning district. Findings are similar to those of the site plan, but are broader in scope in that the location of the use is up for consideration with each permit. Also, project conditions tend to be more broadly based in the range of subjects addressed, and include, in addition to the site development parameters considered in site plan review, such issues as noise, traffic, and hours of operation.

4. Variances.

The variance, unlike the CUP or site plan, is considered a form of "zoning relief." It is considered an extraordinary remedy. It is only available when the strict application of FMC provisions (typically, development standards such as setbacks) will cause a **hardship** upon the property owner which is not experienced by other property owners. Before approving of a variance, the decisionmaker must find both that there are circumstances relating to the property amounting to a **hardship** upon the owner if the variance is not granted, and that the issuance will also not constitute a **privilege** not shared by others.

5. Plan Consistency.

The FMC expressly requires that every CUP and variance be consistent with an operable plan. The FMC does not include site plans or building permits within the FMC's express consistency requirement; however, staff and the City Attorney's Office strongly discourage approval of site plans which authorize structures or completion of developments which are plainly inconsistent with plan policies such as architectural guidelines; in such cases, a CEQA issue may be implicated and it will be difficult to find on the basis of **substantial evidence** that the permit does not result in harm to surrounding properties.

6. Conditions of Approval.

At the heart of every special permit, and structuring the City's approval of each, are the permits **conditions of approval**. The **conditions of approval** are key to defining the extent to which the City decides in any given case to exercise its authority of a land use. They are substantially akin to the terms of a contract. The wording is important. Each permit, and its **conditions of approval**, run with the land and cannot be made to expire on the basis of property transfer.

E. SUBDIVISIONS

Subdivision planning is a highly technical subject area involving a complex interplay of land use and real property law and civil engineering. State law preempts many of the procedures and substantive requirements for subdivisions. We limit our discussion solely to those map issues arising in the public hearing process.

1. Map Required for All Subdivisions.

As a general rule, the California **Subdivision Map Act** requires that either a **parcel map** or **tentative map** is required before undertaking any real estate transaction which will result in the **division of land** into separate units, or **parcels**, for the purpose of **sale, lease or financing**. The Zoning Ordinance (FMC Chapter 12) contains two articles governing map processes. An approved map divides the landscape into different **parcels** which are delineated by a subdivision map which memorializes the official lots of record for title purposes at the County Recorder's office.

(a) Land Use Planning Tool.

The courts have declared that an overriding purpose of the Subdivision Map Act is to give local authorities maximum control over the design of subdivisions and uses of land. Subdivision maps are one of the main vehicles the City uses to implement its various planning policies and regulations. As with special permits, each map is accompanied by detailed **conditions of approval** which define the extent of the City chooses control over the land use. Also as with both rezones and special permits, every subdivision map must be consistent with the operable plans.

(b) Types of Maps.

Subject to limited exceptions, both a **tentative map** and a **final subdivision map** are required for every subdivision which creates five or more parcels. However, only a single **parcel map** is required for any subdivision of four parcels or less. Sometimes applicants opt for both a tentative and final parcel map. Vesting tentative maps and vesting tentative parcel maps are also authorized and allow the developer to "freeze" development standards and conditions of approval.

(c) **Exemptions.**

There are several exemptions, the most significant of which are conveyances of land to and from the City and agricultural, industrial, commercial and residential apartment building leases (in practice, this means most leases are exempt). **Condominium** and **cooperative** developments are, however, subject to mapping requirements. **Lot line adjustments** are allowed without a map because they do not create new parcels.

(d) **Map Agreements.**

Most maps involve the creation of substantial improvements, such as streets, sidewalks, landscaping and other fundamental code-required improvements. **Subdivision Map Agreements** and **Parcel Map Agreements** provide a means by which the developer posts bonds and commits to installing the improvements under the agreement's terms after the filing of a final map.

2. **Subdivision Review Process.**

(a) **Hearings and Appeals.**

The Development Director approves all parcel maps without a hearing; however, the Development Director's decision is subject to appeal to the Planning Commission, and the Planning Commission's decision subject to appeal to the Council. The Planning Commission approves all tentative maps, which are then subject to appeal to the Council. Staff approves modifications subject to notification of the same to the Commission. Like special permits, subdivision map proceedings entail **quasi-judicial** decisionmaking and can be either approved or denied only when supported by **findings** based on **substantial evidence**. Unlike special permits, there is no mechanism in the FMC by which the Council can refer a tentative map to itself in the absence of an appeal.

(b) **Scope of Final Map Approval.**

Once a tentative map is approved, **a final map package** is assembled for Council approval. The package includes the **final map** and any **Subdivision Agreement** entered into with the developer (see above) and any associated agreements. Final maps are ordinarily placed on the consent calendar. The overriding issue before the Council when acting on a final map is whether final map is in **substantial compliance** with the tentative map. It is important to remember that rarely can Council impose additional conditions on a **final map** that were not imposed at the **tentative map** stage. Generally, provided the final map is **substantially compliant** with the **conditions of approval** of the **tentative map**, the Council must approve the **final map**.

F. LAND USE PROCESS, GENERALLY

Other than with respect to the specific FMC-required hearing and appeals processes outlined above, following is a brief summary of some of the more significant procedural issues that regularly arise.

1. Rules Governing Hearing Processes.

Four sources of law generally govern the conduct of Council and Planning Commission hearings on land use matter: the Zoning Ordinance; the Brown Act¹²⁰ Council bylaws and Planning Commission Rules and Regulations; and Constitutional Due Process.

2. Constitutional Due Process.

In addition to Planning Commission Rules and Regulations and the Brown Act, Constitutional Due Process applies at public hearings in certain land use matters.¹²¹ A significant consideration is the type of project application which is being considered. Generally, legislative actions (plan amendments and rezones) do not implicate due process procedures. In contrast, **quasi-judicial actions**, such as the special permits described above do. The California Supreme Court has stated that conditional use permits "involve entirely different constitutional considerations" from rezones.¹²²

(a) Notice and Opportunity to Be Heard.

Where a special permit or subdivision map is to be heard, due process, including a reasonable opportunity to be heard, must be provided to project neighbors.¹²³ Generically, the formula for adequate constitutional due process entails the following: 1) notice of pending action; and 2) a reasonable opportunity to be heard at a fair hearing.

(b) Unbiased Decisionmaker.

Another key consideration in any land use proceeding is the need to remain unbiased. This is especially the case for **quasi-judicial** actions, such as special permits (described above). Due process requires, generally, that the decisionmaker approach each hearing with an open mind, and that the decision be based on the information and facts discussed at the hearing. To accomplish this requirement,

¹²⁰ Guidebook (See Section 2).

¹²¹ *Horn v. Ventura County*, 24 Cal. 3d 605, 619 (1979).

¹²² *Horn, supra*, 24 Cal. 3d at 619.

¹²³ *Horn, supra*, 24 Cal. 3d at 619.

decisionmakers must not have a ***personal, financial interest*** in the outcome of a matter, nor should the decisionmaker ***become embroiled in the controversy*** of a matter.¹²⁴ Additionally, ***ex parte contacts*** -- that is, off-the-record discussions between the decisionmaker and one interested party -- are, in principle, prohibited in quasi-judicial proceedings. In practice, this principle does not bar Councilmembers or Planning Commissioners from visiting a project site or otherwise investigating the facts of a project first-hand. However, facts which are crucial to decision -- such as might form the decisionmaker's basis for approving or denying a conditional use permit -- should be stated on-the-record. Please see Guidebook Sections 2 and 4. As a general rule, every decision should be approached with a fresh mind, free of influences which might affect objectivity. One rule of thumb for assuring consistency and objectivity in decision-making is to adhere to the facts, to required Code findings, to applicable plan policies, and to the law.

3. Required Votes and Tie Votes.

With only a few exceptions, a land use action is accomplished by a motion supported by a majority of those decisionmakers present to act on the matter (that is, a minimum of four Councilmembers or Planning Commissioners, or three if only four are present to act). If a motion is made to approve the project, and that motion fails, the project is disapproved and matter is concluded. The issue of tie votes occasionally arises. The general rule is that a tie vote results in the failure of Council or the Planning Commission to enact, grant or, approve a Project and therefore, constitutes a denial of the matter.¹²⁵

4. Mayor's Veto Authority.

The Mayor's veto authority does not extend to special permits, to maps, to rezones, to parcel-specific plan amendments, or amendments to specific policies in plan text. However, the mayor may veto zoning ordinance text amendments and plan adoptions (including initial adoptions and re-adoptions) and plan updates.¹²⁶

G. TAKINGS AND EXACTIONS (PROJECT CONDITIONS AND FEES)

1. Takings.

The United States and California Constitutions prohibit the government from "taking" property for public purposes without "just compensation." This means

¹²⁴ See Guidebook Section 4 for further discussion on Conflicts of Interest.

¹²⁵ See FMC § 12-401-E.

¹²⁶ See Charter § 605 and discussion in and attachments to Guidebook Section 1

that government cannot use its zoning authority to inversely condemn property in order to avoid the expense of instituting eminent domain proceedings and paying for the property. This is a very complex area of constitutional law. The essential test is whether the government's actions deprive an owner of **substantially all economically viable use** of the subject property. The underlying philosophy is that the constitution bars government from making a private property owner suffer the burdens of a public improvement which the public as a whole should shoulder. Of course, merely restricting allowable uses or development on a site, or the amount of profits an owner can make, will not, in and of itself, amount to a taking. For this reason, keeping property zoned at the very low-density residential zoning found in the rural parts of Fresno does not amount to a taking; economically viable use can still be made by developing the property at the allowable, rural density. There is also no taking where development is prohibited because to allow it would create a public nuisance. At the other end of the spectrum, however, barring all development on a site – such as by downzoning property to an “open space” district without allowing any development – may amount to a taking because under such a district the owner may not be able to make any **economically viable use** of the site.

2. Land Use Exactions (Project Conditions and Fees).

Land use exactions -- in the form of project conditions or mitigation fees -- are the chief means by which the City assures that land uses are consistent with the surrounding community. These exactions are subject to takings rules.

(a) Forms in Fresno.

Project conditions are imposed in the following forms: for plan amendments, in the resolution or ordinance adopting the amendment; in a conditional rezone, in the approving rezone ordinance and **zoning contract**; in special permits and maps, in the **conditions of approval**. Conditions may include: a requirement to dedicate land (such as is needed to widen a street abutting the project site); a requirement to construct an improvement (such as to install a traffic signal); or to pay a fee (such as a UGM sewer facilities fee).

(b) “Nexus.”

As a general rule, with respect to project-specific conditions, there must be a *reasonable relationship* between the project's impacts; a *reasonable relationship* is defined by what the courts call the **essential nexus** and **rough proportionality** between a condition and project impacts.

(1) Dolan Test.

Any requirement that the land be reserved or set aside for a specific purpose amounts to a possessory dedication of real property which the United States Supreme Court has held is

subject to heightened scrutiny under a particular test devised by that court.¹²⁷ In *Dolan v. City of Tigard* ("*Dolan*"),¹²⁸ the essence of the U.S. Supreme Court's test was set forth as follows:

... we must first determine whether the "**essential nexus**" exists between the "legitimate state interest" and the permit condition exacted by the city. [citation omitted] If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development.¹²⁹ ... We think a term such as "**rough proportionality**" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development ... [n]o precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication. ...¹³⁰

¹²⁷ *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1988); *Ehrlich v. Culver City*, 12 Cal. 4th 854 (1996). In *Ehrlich*, the California Supreme Court explained the Supreme Court's rationale for imposing "heightened" judicial scrutiny as follows:

[T]he heightened standard of scrutiny is triggered by a relatively narrow class of land use cases—those exhibiting circumstances which increase the risk that the local permitting authority will seek to avoid the obligation to pay just compensation. Neither *Nollan* nor *Dolan* is, after all, a conventional regulatory takings case. Rather, as the court's rationale for its result in *Nollan* demonstrates, both are cases in which the local government attached a condition to the issuance of a development permit which, but for the claim that the exaction is justified by the greater power to deny a permit altogether, would have amounted to an uncompensated requisition of private property.

As Justice Scalia's opinion in *Nollan*, *supra*, 483 U.S. 825, makes clear, such a discretionary context presents an inherent and heightened risk that local government will manipulate the police power to impose conditions unrelated to legitimate land use regulatory ends, thereby avoiding what would otherwise be an obligation to pay just compensation. In such a context, the heightened *Nollan-Dolan* standard of scrutiny works to dispel such concerns by assuring a constitutionally sufficient link between ends and means. It is the imposition of land-use conditions in individual cases, authorized by a permit scheme which by its nature allows for both the discretionary deployment of the police power and an enhanced potential for its abuse, that constitutes the sine qua non for application of the intermediate standard of scrutiny formulated by the court in *Nollan* and *Dolan*. (*Ehrlich*, 12 Cal. 4th at 868-869.)

¹²⁸ 512 U.S. 374, 129 L. Ed. 2d 854, 114 S. Ct. 2309 (1994).

¹²⁹ 512 U.S. at 380.

¹³⁰ *Dolan*, *supra*, 512 U.S. at 391 and 395 (emphasis added).

(2) Development Fees.

Fees can be imposed only by following procedures set forth in the Mitigation Fee Act,¹³¹ which the California Supreme Court has held requires as much constitutional scrutiny by the courts as do land dedications.

(3) The Test.

For any project exaction, regardless of form, there must be:

- (i) A ***legitimate city interest*** in the purpose of the condition;
- (ii) An ***essential nexus*** between the city's interest and the condition;
- (iii) A ***roughly proportionate connection*** between the condition imposed and the project's impacts.

(c) Fact-Based Analysis.

Before imposing any condition, the decisionmaker must be assured that the facts in the record support the determination. Conditions imposed in connection with rezones are not necessarily quasi-judicial. Nonetheless, decisionmakers are advised to support any condition imposed in connection with a rezone with substantial evidence of the rough proportionality between the project's impacts and the conditions. Assuming the City is able to find the essential nexus, city must make an ***individualized determination*** that the specific condition being imposed is implicated by the project.¹³² Under *Dolan*, rough proportionality requires that there be more than just the essential nexus, but also enough facts demonstrating that the value, size, amount or degree of the condition is caused by the specific proposal being reviewed. In *Dolan*, the U.S. Supreme Court struck down a requirement that a hardware store owner dedicate land for a bicycle path in order to offset what the city in that case found "could" be traffic impacts generated by the development; the Court dismissed the city's general recitation of project traffic trip figures and street capacities, calling such analysis "conclusory."

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¹³¹ Government Code §§ 66000, *et seq.*

¹³² *Dolan, supra*, 512 U.S. at 391.

(d) Legislative Property Development Standards.

The California Supreme Court has upheld requirements cities impose upon developers to adhere to basic development standards, such as requirements to build sidewalks or to adhere to setbacks.¹³³ If the conditions apply to all property owners in a district, no rough proportionality analysis is required.

3. Excessive Dedications.

The City has utilized the Urban Growth Management ("UGM") review process as a means of lawfully imposing what are sometimes called "excessive dedications" upon developments occurring in areas where not all infrastructure is yet developed. These are conditions that would ordinarily be evaluated as being above and beyond what exceeds the impacts of the particular project, but which are imposed because other, subsequent developers and projects that will benefit from the infrastructure will be required to contribute their "fair share" of the cost of the infrastructure into the UGM fund. These collected monies are then returned to the developer who fronted the costs of the facilities.

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¹³³ *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996).